BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEON R. BAIRD	)	
Claimant	)	
	)	
VS.	)	
	)	
WESTERN PLAINS REG. MED. CTR.	)	
Respondent	)	Docket No. **264,415**
	)	
AND	)	
	)	
AMER. CASUALTY OF READING, PA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of a preliminary Order entered by Administrative Law Judge Pamela J. Fuller on August 23, 2001.

ISSUES

The Administrative Law Judge denied claimant's request for medical treatment, payment of medical bills and medical mileage because claimant failed to meet his burden of proof that he sustained accidental injury arising out of and in the course of his employment. The claimant appealed the denial of benefits. The respondent contends the claimant failed to meet his burden of proof and requests the Administrative Law Judge's decision be affirmed. The issues for review by the Board are whether claimant suffered an accidental injury on the date alleged and whether the injury arose out of and in the course of employment.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

1. The claimant began his employment as a registered nurse for respondent in August 2000. His duties caring for patients required bending, stooping and lifting.

2. In October 1998, the claimant had sustained a work-related injury to his back working for a different employer. An MRI taken during his course of treatment for that injury revealed an L-4,5 disc herniation lateral to the right. The claimant underwent conservative treatment and ultimately returned to work with no restrictions.

3. On December 31, 2000, the claimant was at the Longhorn Saloon in Dodge City and engaged in some country swing dancing wherein he would physically assist his partner flip over in a cart wheel type dance routine. The following day the claimant was late to work and advised his co-workers that his back was hurting from his dance activities the previous night.

4. Claimant worked on January 4, 2001, and when he awoke on January 5, 2001, he experienced right buttock pain which worsened during the day. The claimant called and advised his supervisor, John Thompson, that he could not work and did not know what had happened to his back.

5. Mr. Thompson had called claimant's immediate supervisor, Cindy Krisle, to advise her claimant was not coming to work because his back was hurting. Mr. Thompson did not advise Ms. Krisle that claimant had alleged his back pain was the result of work activities.

6. Claimant noted nothing had happened at work on January 4, 2001, which caused him to think he had injured himself and he did not experience any pain during that workday. The only reason claimant attributed his pain to his job was because he had worked the prior day.

7. Although claimant initially stated none of his prior episodes of back pain were the same as the pain he experienced on January 5, 2001, he later admitted he had experienced similar symptoms with pain radiating into his buttock and legs in connection with his prior injury in 1998.

8. Claimant had a telephone conversation with his direct supervisor, Cindy Krisle, on January 10, 2001. Claimant testified he advised her that he had hurt his back at work and was advised to get treatment.

9. Cindy Krisle testified she had initiated the call to claimant on January 10, 2001, in order to discuss his attendance. Ms. Krisle noted during the conversation the claimant became angry and inquired if he was going to be fired. Claimant then advised Ms. Krisle he had hurt his back at work. Claimant was asked if he had filled out an incident report or reported it to anybody and he responded he had not because he did not know that it happened at work.

10. Ms. Krisle further noted during the conversation claimant had stated he did not know his injury had happened at work but he was going to turn it in to "work comp" and he

could get the information she needed otherwise "we'll just sue you guys. My mom and dad say we should sue you anyway."

11. Claimant admitted he told Ms. Krisle he could get documentation from the doctor in order to turn the claim in as work-related and he further stated if he had to sue he would.

12. On January 11, 2001, the claimant saw a physician's assistant in the occupational health department. The contemporaneous notes of that visit indicate claimant did not know what had happened and his back pain had increasingly worsened.

13. On January 20, 2001, the claimant filled out an incident investigation report which noted the incident occurred when claimant awoke on the morning of January 5, 2001, with right buttock pain that developed into right leg pain. The claimant indicated he did not know what caused the incident to occur. He further indicated that about a year and a half ago he had the same symptoms. Lastly, claimant noted he did not immediately report the incident because he thought it was going to get better.

14. Claimant was referred to Dr. Kyi for treatment. During the course of treatment, the claimant admitted he threatened to sue the doctor and his nurse when his prescription for Percocet was not refilled.

15. Claimant then sought treatment with Dr. Murati. The initial office visit notes with Dr. Murati contain the history that claimant did not attribute his low back complaints to any specific injury but claimant felt the symptoms were the result of his repetitive lifting duties as a registered nurse.

16. Dr. Murati noted the MRI taken on April 27, 1999, showed a disc herniation at L-4,5 lateral to the right. The MRI taken January 23, 2001, also showed a disc herniation at L-4,5 lateral to the right.

CONCLUSIONS OF LAW

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of

[1]K.S.A. 44-501(a); *see also* Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[2]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The Workers Compensation Act provides:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.[5]

Although claimant's acute onset of low back pain occurred at his home, claimant nevertheless relates his injury to the repetitive trauma of his regular job duties. The claimant could not detail any specific incident that caused the onset of his pain. Moreover, the claimant specifically noted he did not have any pain on the day of the alleged accident. When claimant awoke at home on the morning of January 5, 2001, he noted a specific onset of radicular pain into his right buttock which over the course of the day radiated into his right leg.

The claimant simply concluded his condition was work-related because he had worked the prior day. However, the evidence, as it currently exists, fails to support claimant's position in this regard. The record contains a history of claimant's prior back problems with exacerbations attributed to falls from horseback and dancing. The record further indicates claimant did not contend his condition was caused by work until the conversation with his supervisor regarding his attendance problems. The Board agrees with the Administrative Law Judge's conclusion that causation has not been established. Claimant has failed in his burden of proving that his current need for medical treatment is a result of injury by accident arising out of and in the course of his employment with respondent.

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[2]K.S.A. 44-508(g). *See also* *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[3]Brobst v. Brighton Place North, 24 Kan. App. 2d 766,771, 955 P.2d 1315 (1997).

[4]Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

[5]K.S.A. 44-508(d).

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[6]

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated August 23, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2001.

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BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

[6]K.S.A. 44-534a(a)(2).